## Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-7–01 OF 2019
MOHAMAD ZABIDIN, NANTHA BALAN AND DARRYL GOON JJCA
10 SEPTEMBER 2021

*Civil Procedure — Appeal — Assessment of damages — Whether plaintiffs entitled to damages based on market value determined by defendant's valuer — Whether doctrine of judicial estoppel applicable — Whether appellate intervention was warranted — Rules of Court 2012 O 37 r 1*

This was an appeal by the appellants who were the plaintiffs in Kuala Lumpur High Court Suit No S-22–1110 of 2005 ('Suit 1110'). Suit 1110 was filed on 21 September 2005. At the conclusion of the main trial and appeals to the Court of Appeal and Federal Court, the respondent was ordered to pay to the appellants damages for breach of contract, which was to be assessed by the senior assistant registrar ('SAR') of the High Court. On 16 and 17 January 2018, the SAR assessed the damages. On 4 May 2018, the SAR rejected the appellants' claim for substantial damages and instead awarded nominal damages of RM60,000 and costs of RM8,000. The appellants lodged an appeal to the judge in chambers. On 7 January 2019, the learned judge of the High Court ('the judge') dismissed the appellants appeal against the SAR's said award of nominal damages. Hence, the present appeal against the judge's order dated 7 January 2019. The main trial for Suit 1110 on the issue of liability (for breach of contract) and for the reliefs sought, took place way back in 2012. The learned judicial commissioner ('JC') who heard the trial, handed down a judgment/order dated 29 May 2012 in favour of the appellants, but the appellants did not get exactly what they wanted. The appellants appealed to the Court of Appeal. The appeal was allowed and the JC's decision on the reliefs was varied. The respondent was dissatisfied with the Court of Appeal's order and took the matter to the Federal Court. The Federal Court set aside part of the Court of Appeal's order, and remitted the case to the SAR, for damages to be assessed. The matter came before the Court of Appeal by way of an appeal by the appellants who contended that the award of nominal damages should be set aside and that they should be granted substantial damages. The reliefs sought in Suit 1110 were as follows: (a) specific performance and/or damages in lieu thereof; (b) special damages; (c) general damages and/or exemplary damages in the sum of RM 350,000.00 to each of the plaintiffs (second and third appellants jointly and, fifth and sixth appellants jointly); (d) interest at a rate to be determined by the court; (e) costs of the action; and (f) any such further relief as may be just and equitable in the circumstances. The key issue in the appeal, was whether the appellants, whose valuer's report and evidence on

market value was rejected, were nevertheless entitled to damages based on the market value determined by the respondent's valuer, despite the appellants having challenged and rejected the latter's valuation report and having cross-examined the respondent's valuer.

**Held**, allowing the appeal with costs:

(1) The court was in agreement with the defendant's submission that Sr Lee's 2016 valuation was flawed as it was prepared based on a wrong premise. The provenance of Sr Lee's mistaken premise was not important. The fact was — he undertook a valuation on the (mistaken) assumption that he was to determine the market value of a unit in The Saffron. It was the court's view that there was no justification to interfere with the concurrent findings by the SAR and the judge, that Sr Lee's valuation report dated 8 November 2016 must be rejected (see para 70).

(2) The doctrine of judicial estoppel would only apply to a party where the said party against whom the doctrine was being asserted, had successfully and unequivocally persuaded the court on, or asserted, a position in an earlier proceeding so that when that had taken place, the party would be estopped from asserting an inconsistent position in a subsequent proceeding. Here, the plaintiffs' position in the assessment proceedings, namely that Sr Lee's valuation should be accepted, did not prevail. Secondly, the plaintiffs' position that Sr Zamri's valuation should be rejected, also did not prevail. Thus, the plaintiffs failed on both counts. Thus, conceptually, the doctrine of judicial estoppel could not apply (see paras 78–79).

(3) It was important to bear in mind that the theory behind the doctrine of judicial estoppel was that parties should not be permitted to abuse the judicial process by taking inconsistent stands. The court did not agree that by challenging Sr Zamri's valuation and cross-examining him, the plaintiff was precluded from relying on the market valuation as determined by Sr Zamri. At the end of the day, the real question in the appeal was whether the rejection of Sr Lee's valuation of itself, was sufficient for the court to conclude that the plaintiffs had not proven any substantial damages. This was where the learned justices disagreed with the approach that was taken by the SAR and the judge. The critical evidence was rejected that was relevant to the question of damages (see paras 80–82 & 86).

(4) When damages were ordered to be assessed, the right to damages would have been established. While evidence of the damages suffered that was proffered by the plaintiffs might have been rejected, it did not follow that the evidence proffered by the defendant, which was not rejected, ceases to exist. The defendant's evidence as to the market value, not rejected by the SAR, remains and could not be ignored. It did not matter who tendered

the evidence but so long as the evidence was admissible and admitted, it could not be ignored particularly if evidence given to the contrary has been found wanting and rejected. The court was of the view that any reasonable tribunal, properly armed with these facts and applying the legal principles alluded to earlier, would have concluded that based on Sr Zamri's valuation, the plaintiffs were entitled to damages based on RM520,200 per condominium unit or RM450per sqft Hence, appellate intervention was warranted (see paras 104–106).

**[Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu yang merupakan plaintif di dalam Saman Mahkamah Tinggi Kuala Lumpur No S-22-1110-2005 ('Guaman 1110'). Guaman 1110 telah difailkan pada 21 September 2005. Pada akhir perbicaraan penuh dan rayuan ke Mahkamah Rayuan dan Mahkamah Persekutuan, responden diperintahkan untuk membayar ganti rugi perayu kerana melanggar kontrak, yang akan dinilai oleh penolong kanan pendaftar ('PKP') Mahkamah Tinggi. Pada 16 dan 17 Januari 2018, PKP menilai kerugian tersebut. Pada 4 Mei 2018, SAR menolak tuntutan perayu untuk ganti rugi penuh dan sebaliknya membenarkan ganti rugi nominal sebanyak RM60,000 dan kos RM8,000. Perayu mengemukakan rayuan kepada hakim di dalam kamar. Pada 7 Januari 2019, hakim Mahkamah Tinggi ('hakim tersebut') menolak rayuan perayu terhadap keputusan PKP berkenaan ganti rugi nominal. Oleh itu, rayuan ini adalah terhadap perintah hakim tersebut bertarikh 7 Januari 2019. Perbicaraan penuh untuk Guaman 1110 mengenai isu liabiliti (untuk pelanggaran kontrak) dan untuk relif yang dipohon, berlaku pada tahun 2012. Pesuruhjaya kehakiman terpelajar ('PK') yang mendengar perbicaraan tersebut, memberikan perintah bertarikh 29 Mei 2012 yang memihak kepada perayu, tetapi perayu tidak mendapat relif yang dipohon. Perayu merayu ke Mahkamah Rayuan. Rayuan tersebut dibenarkan dan keputusan PK disesuaikan. Responden tidak berpuas hati dengan perintah Mahkamah Rayuan dan membawa perkara tersebut ke Mahkamah Persekutuan. Mahkamah Persekutuan mengenepikan sebahagian perintah Mahkamah Rayuan, dan mengembalikan kes tersebut kepada PKP, untuk menilai ganti rugi. Perkara tersebut didengar di hadapan Mahkamah Rayuan melalui rayuan oleh perayu yang berhujah bahawa perintah ganti rugi nominal harus diketepikan dan harus diberikan ganti rugi penuh. Relif yang dipohon di dalam Guaman 1110 adalah seperti berikut: (a) perlaksanaan spesifik dan/atau ganti rugi tertentu sebagai ganti; (b) ganti rugi khas; (c) ganti rugi am dan/atau ganti rugi teladan berjumlah RM 350,000.00 daripada setiap plaintif (perayu kedua dan ketiga secara bersama dan, perayu kelima dan keenam secara bersama); (d) faedah pada kadar yang ditentukan oleh mahkamah; (e) kos tindakan; dan (f) mana-mana relif selanjutnya yang adil dan sesuai. Isu utama dalam rayuan tersebut adalah sama ada perayu, yang laporan penilai dan bukti mengenai nilai pasaran ditolak ketika pendengaran tersebut, berhak mendapat ganti rugi berdasarkan nilai pasaran yang ditentukan oleh penilai responden,

walaupun perayu telah mencabar laporan penilaian kedua dan memeriksa balas nilai responden.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Mahkamah ini bersetuju dengan hujahan defendan bahawa penilaian Sr Lee pada tahun 2016 adalah defektif kerana ianya disediakan berdasarkan fakta yang salah. Bukti Sr Lee yang salah adalah tidak penting. Fakta kes ini menunjukkan — beliau melakukan penilaian terhadap andaian yang silap bahawa beliau harus menilai nilai pasaran unit The Saffron. Mahkamah ini berpendapat bahawa tiada justifikasi untuk mengganggu keputusan serentak oleh PKP dan hakim tersebut, bahawa laporan penilaian Sr Lee bertarikh 8 November 2016 harus ditolak (lihat perenggan 70).

(2) Doktrin estoppel kehakiman hanya terpakai kepada pihak di mana pihak tersebut yang , yang mana telah berjaya meyakinkan mahkamah bahawa terdapat pendirian yang tidak konsisten dibuat di dalam prosiding berikutnya berbanding prosiding sebelumnya. Di sini, kedudukan plaintif dalam prosiding penilaian, iaitu penilaian Sr Lee harus diterima, tidak wujud. Kedua, kedudukan plaintif bahawa penilaian Sr Zamri harus ditolak, juga tidak wujud. Oleh itu, plaintif gagal dalam kedua-dua perkara ini. Oleh itu, doktrin estoppel kehakiman tidak dapat digunakan di dalam kes ini (lihat perenggan 78–79).

(3) Teori doktrin estoppel kehakiman adalah bahawa pihak-pihak tidak boleh dibenarkan menyalahgunakan proses kehakiman dengan mengambil pendirian yang tidak konsisten. Mahkamah tidak bersetuju bahawa dengan mencabar penilaian Sr Zamri dan memeriksa balasnya, plaintif dihalang daripada bergantung kepada penilaian pasaran seperti yang ditentukan oleh Sr Zamri. Kesimpulannya, isu sebenar di dalam rayuan tersebut adalah sama ada penolakan penilaian S. Lee, adalah mencukupi untuk mahkamah ini membuat kesimpulan bahawa plaintif tidak membuktikan ganti rugi penuh. Menurut fakta inilah yang menunjukkan hakim tidak bersetuju dengan pendekatan yang diambil oleh PKP dan hakim tersebut. Bukti kritikal telah ditolak yang mana ianya berkaitan dengan persoalan ganti rugi (lihat perenggan 80–82 & 86).

(4) Apabila ganti rugi diperintahkan untuk dinilai, pihak berhak untuk mendapatkan ganti rugi tersebut. Walaupun keterangan berkenaan ganti rugi mungkin akan ditolak, tidak semestinya keterangan yang dikemukakan oleh defendan yang masih tidak ditolak tidak lagi wujud. Keterangan defendan mengenai nilai pasaran yang tidak ditolak oleh PKP, kekal dan tidak boleh diabaikan. Selagi keterangan tersebut boleh diterima dan diterima mahkamah, ianya tidak boleh diabaikan terutamanya sekiranya keterangan yang diberikan sebaliknya telah

ditolak. Mahkamah ini berpendapat bahawa di mana-mana tribunal yang munasabah akan membuat kesimpulan bahawa berdasarkan penilaian Sr Zamri, plaintif berhak mendapatkan ganti rugi berdasarkan RM520,200 setiap unit kondominium atau RM450per sqft. Oleh itu, mahkamah ini boleh membuat campur tangan rayuan (lihat perenggan 104–106).]

**Cases referred to**

*Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491; [2014] 2 AMCR 669; [2014] 7 CLJ 461, CA (refd)
*Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2013] 9 MLJ 360; [2013] 1 LNS 98, HC (refd)
*Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practicing as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465, FC (refd)
*Flint v Lovell* [1935] 1 KB 354, CA (refd)
*Leisure Farm Corporation Sdn Bhd v Kabushiki Kaisha Ngu & Ors* [2017] 5 MLJ 63; [2017] 1 LNS 499, CA (refd)
*Peguam Negara Malaysia v Nurul Izzah Anwar & Ors* [2017] MLJU 273; [2017] 5 CLJ 595, CA (refd)
*Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)
*Tan Kah Khiam v Liew Chin Chuan & Anor* [2017] 2 MLJ 445; [2006] 4 CLJ 715, CA (refd)
*UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4, HC (refd)
*Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229, CA (refd)

**Legislation referred to**

Companies Act 1965 s 176
Evidence Act 1950 s 58
Rules of Court 2012 O 37 r 1, O 40A r 3(2)(h)

**Appeal from**: Suit No S1-22–1110 of 2005 (High Court, Kuala Lumpur)

*Harpal Singh Grewal (Reny Rao with him) (PS Sohanpal & Sidhu) for the appellants.*
*Tharminder Singh (Izral Partnership) for the respondent.*

**Nantha Balan JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This is an appeal by the plaintiffs in Kuala Lumpur High Court Suit No S-22–1110 of 2005 ('Suit 1110'). Suit 1110 was filed on 21 September 2005. At the conclusion of the main trial and appeals to the Court of Appeal

A and Federal Court, the defendant was ordered to pay to the plaintiffs damages for breach of contract, which was to be assessed by the senior assistant registrar ('SAR') of the High Court. On 16 and 17 January 2018, the SAR assessed the damages. On 4 May 2018, the SAR rejected the plaintiffs' claim for substantial damages and instead awarded *nominal* damages of RM60,000 and costs of B RM8,000. The plaintiffs lodged an appeal to the judge in chambers. On 7 January 2019 the learned judge of the High Court ('the judge') dismissed the plaintiffs' appeal against the SAR's said award of *nominal* damages. The appeal herein is directed against the judge's order dated 7 January 2019.

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**[2]** The main trial for Suit 1110 on the issue of liability (for breach of contract) and for the reliefs sought, took place way back in 2012. The learned judicial commissioner ('JC') who heard the trial, handed down a judgment/order dated 29 May 2012 in favour of the plaintiffs, but the D plaintiffs did not get exactly what they wanted. The JC's judgment is reported as *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2013] 9 MLJ 360; [2013] 1 LNS 98 (HC) ('the said GOJ'). The plaintiffs appealed to the Court of Appeal. The plaintiffs' appeal was allowed and the JC's decision on the reliefs was varied (see *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491; [2014] 2 AMCR 669; [2014] 7 CLJ 461 (CA)). E

**[3]** The defendant was dissatisfied with the Court of Appeal's order and took the matter to the Federal Court. The Federal Court set aside part of the Court of Appeal's order, and remitted the case to the SAR, for damages to be assessed.

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**[4]** As mentioned, the SAR's decision on damages was given on 4 May 2018. The plaintiffs then appealed to the judge, who upheld the SAR's decision and dismissed the plaintiffs' appeal. The matter now comes before us by way of an appeal by the plaintiffs who contended that the award of *nominal* damages G should be set aside and that they should be granted substantial damages.

**[5]** The key issue in this appeal, is whether the plaintiffs, whose valuer's report and evidence on market value was rejected, are nevertheless entitled to damages based on the market value determined by the defendant's valuer, H despite the plaintiffs having challenged and rejected the latter's valuation report and having cross-examined the defendant's valuer.

**[6]** In view of the several rounds of litigation before the present appeal, we think that it is desirable and necessary to set out the background facts in some I detail, to understand where and how the dispute started, and where the parties presently find themselves. The background facts have been set out exhaustively in the JC's said GOJ and we do not propose to restate them in their entirety. For convenience and brevity, we have referred to the appellants and the respondent as 'plaintiffs' and 'defendant' respectively.

BACKGROUND

**[7]** Briefly, the background to this dispute originates with the defendant's launch of a condominium development known as 'Villa Perhentian'. The Villa Perhentian project was launched in 1996 and was originally due to be completed in 1999. The Villa Perhentian project was to be developed on Lot 91 (new Lot 286) Section 84, GRN 66575, Bandar Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ('the land').

**[8]** The plaintiffs had purchased condominium units in the Villa Perhentian project. Pursuant to the sales and purchase agreements entered between the defendant and first plaintiff, second and third plaintiffs jointly, fourth plaintiff, fifth and sixth plaintiffs jointly, and seventh plaintiff respectively dated 9 December 1996, 9 December 1996, 13 November 1996, 27 November 1996 and 13 November 1996 ('collectively the SPAs'), the plaintiffs agreed to purchase from the defendant, condominium units in the Villa Perhentian project at the following purchase prices.

(a) first plaintiff — (purchase price): RM196,660;

(b) second and third plaintiffs jointly (purchase price): RM199,660;

(c) fourth plaintiff — (purchase price): RM189,460;

(d) fifth and sixth plaintiffs jointly — (purchase price): RM185,460,00; and

(e) seventh plaintiff — (purchase price): RM189,460.

**[9]** Payments were made by the plaintiffs towards the purchase price of the properties. The first plaintiff paid RM58,998, the second and third plaintiffs jointly paid RM59,698, fourth plaintiff paid RM56,838, fifth and sixth plaintiffs jointly paid RM55,638 and seventh plaintiff paid RM56,834.

**[10]** In accordance with cl 22(1) of the SPAs, the defendant agreed to hand over vacant possession of the units in Villa Perhentian to the plaintiffs within thirty-six months from the date of plaintiffs' respective SPAs together with water and electricity which must be ready for connection, failing which, pursuant to cl 22(2) of the SPAs, the plaintiffs were immediately entitled to liquidated damages, to be calculated daily at the rate of 10%pa of the purchase price.

**[11]** The defendant was under an obligation to hand over the completed units of Villa Perhentian equipped with common facilities within the stipulated 36 months failing which pursuant to cl 24(2) of the SPAs, the defendant was to pay liquidated damages to be calculated daily at the rate of ten per cent (10%)pa on the last twenty per cent (20%) of the purchase price.

**[12]** Despite the plaintiffs' payment of the defendant's progress payment claims, the defendant ceased all construction works on Villa Perhentian at the end January 1998 after completing only 30% of the construction works on the project.

**[13]** The Villa Perhentian project was permanently abandoned and was never completed. The defendant maintained that the global financial crisis had 'frustrated' the SPAs.

**[14]** Thus, by the project completion date in December 1999, the defendant failed to complete the construction and to deliver vacant possession of the units in Villa Perhentian to the plaintiffs.

**[15]** During the material period of the project suspension, the plaintiffs were made to understand that pursuant to s 176 of the Companies Act 1965, the defendant's holding company, Taiping Consolidated Sdn Bhd, had undertaken and embarked on a corporate restructuring exercise which involved and included a financial restructuring scheme for a potential revival of Villa Perhentian. Subsequently, the plaintiffs were offered a refund of all the monies which they had paid to the defendant towards the purchase of Villa Perhentian. The plaintiffs rejected the offer.

**[16]** Suit 1110 was accordingly filed on 21 September 2005. The reliefs sought in Suit 1110 (para 30 of the statement of claim) were as follows:

(a) specific performance and/or damages in lieu thereof:

(b) special damages;

(c) general damages and/or exemplary damages in the sum of RM350,000 to each of the plaintiffs (second and third plaintiffs jointly and, fifth and sixth plaintiffs jointly);

(d) interest at a rate to be determined by the court;

(e) costs of the action; and

(f) any such further relief as may be just and equitable in the circumstances.

**[17]** After the financial crisis had abated, and about one year after Suit 1110 was filed, the defendant embarked on a new condominium project on the land, known as 'The Saffron'. The Saffron was launched in 2006 and completed in 2008.

**[18]** Thus, The Saffron had replaced the Villa Perhentian project. It was not a mere renaming of the former project. Rather, it was altogether a new project.

**[19]** The plaintiffs who had made part payment (30%) towards the purchase of units in the Villa Perhentian project were left in a lurch, whilst the defendant who were previously in financial doldrums, successfully launched and completed The Saffron. The Saffron was a 'high-end' condominium relative to the Villa Perhentian project.

**[20]** As it turned out, the financial crisis became a boon to the defendant as they were able to abandon the Villa Perhentian and abdicate their contractual obligation under the SPAs and thereafter embark on a more profitable high-end condominium project, much to the chagrin, dismay and disappointment of the plaintiffs, who were after all, innocent purchasers.

**[21]** Thus, despite the plaintiffs continuous readiness to complete the sale and purchase transaction, the defendant failed to complete the construction of Villa Perhentian and deliver vacant possession of the same. Up to the institution of the Suit 1110, the defendant had continuously neglected and, failed to hand over Villa Perhentian to the plaintiffs pursuant to the terms of the SPAs. The plaintiffs thus claimed that they had suffered losses and damages because of the defendant's breach of their contractual obligations under the SPAs with the plaintiffs.

HIGH COURT ORDER

**[22]** After a full trial, the High Court (per the JC's order dated 29 May 2012) declined to grant specific performance and in lieu thereof, granted the following reliefs:

(1) tuntutan Plaintif-Plaintif untuk perlaksanaan specific ditolak;

(2) sebagai balasan kesemua Plaintif yang dirujuk dalam kelima Perjanjian Jual Beli di beri gantirugi sebanyak RM120,000 bagi setiap perjanjian jual-beli;

(3) Defendan memulangkan deposit dan bayaran pendahuluan yang telah dijelaskan sebanyak 30% dari harga jualan;

(4) faedah pada kadar 4% setahun dari tarikh tuntutan bermula sehingga tarikh penghakiman; dan

(5) kos sebanyak RM40,000 (Ringgit Malaysia Empat Puluh Ribu).

COURT OF APPEAL

**[23]** Essentially, the High Court had ordered the defendant to pay damages in the sum of RM120,000 per SPA and to refund all progress payments which had been made by the plaintiffs. The plaintiffs were dissatisfied with the High Court's order. The plaintiffs appealed to the Court of Appeal via Civil Appeal

No W-02–1490–07 of 2012. On 12 June 2014, the Court of Appeal allowed the appeal in part (see *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491; [2014] 2 AMCR 669; [2014] 7 CLJ 461 (CA)).

**[24]** The Court of Appeal set aside the High Court's award of RM120,000 for each of the SPAs, and ordered liquidated and ascertained damages plus compensation which was to be calculated on the basis of the difference between the market value of condominium units in the vicinity which are comparable to the Villa Perhentian condominium, and the purchase price.

**[25]** The passage from the judgment of the Court of Appeal which is relevant is [19] and reads as:

> [19] As to specific performance, quite obviously the respective SPAs have become incapable of performance through no fault or breach of the appellants.
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> *No evidence was adduced why, after recovery from the global financial crisis, the suspended Villa Perhentian Condominium could not be revived. Instead, the respondent elected, in 2006, to launch 'The Saffron'.* In a real sense, the facts show that the respondent chose to breach the SPAs with the appellants. Clearly, pursuant to s 18(5) of the Act, the court is not precluded from awarding damages, and pursuant to s 18(2), holding that in the circumstances of impossibility specific performance ought not to be granted, but that there being a contract between the parties which has been broken by the respondent and that the appellants are entitled to compensation for that breach, the court must award compensation accordingly *in lieu* of specific performance. It is appropriate, in the circumstances, that *such compensation be assessed by the Deputy Registrar of the High Court by comparison with an average market value of comparable units in the vicinity and deducting therefrom the purchase price under the SPAs in each case.* We are mindful that the appellants paid 30%, but they were not the parties in breach. Further, there is no evidence that they are in any difficulty to make payment had the Villa Perhentian Condominium been completed and delivered as agreed. (Emphasis added.)

**[26]** The Court of Appeal's order dated 12 June 2014 (with emphasis added) reads as follows:

> (a) Perintah gantirugi sebanyak RM 120,000 oleh Mahkamah Tinggi Kuala Lumpur diketepikan dan digantikan dengan gantirugi 'Liquidated and Ascertained Damages'. mengikut Klausa 22(2) dan 24(2) daripada 36 bulan dari tarikh perjanjian Jual Beli masing-masing hingga 26/07/2002 dengan kadar faedah 8% setahun dari tarikh writ saman hingga Tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 dan dengan kadar faedah 5% setahun dari tarikh berkuatkuasanya Kaedah-kaedah Mahkamah 2012 hingga penyelesaian penuh;
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> (b) *Perayu-Perayu diawadkan gantirugi Am untuk kemungkiran Perjanjian Jual Beli sebagai ganti kepada remedi pelaksanaan spesifik di mana pampasan dilaksikan oleh timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur*

*dengan perbandingan nilai purata pasaran unit hartanah kawasan tersebut dengan menolak harga pembelian didalam setiap Perjanjian Jual Beli* dengan faedah dari hari tarikh penghakiman Mahkamah Tinggi Kuala Lumpur dengan kadar faedah 8% setahun hingga tarikh berkuatkuasanya Kaedah- Kaedah Mahkamah 2012 dan dengan kadar faedah 5% setahun dari tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 hingga penyelesaian penuh;

(c) Perintah pemulangan deposit-deposit dikekalkan dengan faedah 8% setahun hingga tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 dan dengan kadar faedah 5% setahun dari tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 atas jumlah tersebut dari tarikh deposit dibayar hingga tarikh pembayaran penuh;

(d) Kos bagi rayuan ini sebanyak RM 10,000,00; dan

(e) Deposit sebagai sebahagian dari kos.

FEDERAL COURT

**[27]** The defendant was dissatisfied with the Court of Appeal's order. The defendant lodged an appeal to the Federal Court after having obtained leave. The Federal Court (per the order dated 29 October 2015) allowed the defendant's appeal and set aside part of the Court of Appeal's order relating to the award of liquidated and ascertained damages. The Federal Court's order reads as:

(1) Rayuan Perayu dibenarkan;

(2) Perintah Mahkamah Rayuan bertarikh 12.6.2014 diubah setakat:-

(i) Perenggan (a) diketepikan;

(ii) *Perenggan (b) dikekalkan*;

(iii) Perenggan (c) bagi pemulangan pembayaran sebahagian dikekalkan bersama dengan faedah-faedah keatasnya pada kadar 4% pra-penghakiman dan 5% post-penghakiman dari tarikh pembayaran sebahagian telah dibayar kepada Perayu sehingga tarikh pengambilan semula ('*recovery*'); dan

(3) Kos sebanyak RM10,000 kepada Perayu; dan

(4) Deposit dikembalikan kepada Perayu. (Emphasis added.)

**[28]** Ultimately, the outcome was that the defendant was ordered to refund the monies (progress payments) which had been paid by the plaintiffs and to pay damages to the plaintiffs based on the difference between the market value of a similar condominium unit in the vicinity and the purchase price (plus interest).

**[29]** The refund of progress payments is not the subject of the present dispute. It is important to keep in mind that the Villa Perhentian project was never completed. In fact, the Villa Perhentian project was abandoned during the financial crisis. But when the financial crisis abated, the defendant decided to build a luxury condominium, The Saffron, on the very same land where the Villa Perhentian project was supposed to be built.

**[30]** Thus, the challenge in terms of valuation is that the Villa Perhentian condominium did not exist. However, pursuant to the Court of Appeal's order, it was necessary that the market value of the Villa Perhentian condominium units be determined and that would have entailed a comparison with a condominium which was similar (more or less) to the Villa Perhentian condominium. We turn now to the assessment of damages proceedings which took place before the SAR and the subsequent appeal to the judge.

ASSESSMENT OF DAMAGES

**[31]** On 16 June 2016, the plaintiffs filed a notice of assessment of damages (O 37 r 1 of the Rules of Court 2012) (encl 36). On 16 and 17 January 2018, the SAR conducted the trial for the assessment of damages by way of affidavits and cross-examination of the deponents.

**[32]** The assessment of damages was based on the Court of Appeal's order dated 12 June 2014 ('2014 Court of Appeal order') which ordered assessment to be done by comparing the value of a similar unit in another development in the same area, less the purchase price per the SPAs. A total of seven witnesses were called. Two of the witnesses were valuers.

**[33]** The plaintiffs' valuer was surveyor Lee Pak Ling (PW1 — 'Sr Lee'). Sr Lee had previously prepared a valuation report dated 24 November 2011 for purposes of the main trial. In his 2011 valuation report, Sr Lee opined that the market value of a unit of condominium was RM805,000. He prepared another valuation report dated 8 November 2016 for purposes of the assessment of damages, where he gave the value as RM695,000 (RM640per sqft).

**[34]** In his evidence-in-chief, (during assessment of damages before the SAR) Sr Lee said,

> The terms of reference for the valuation of the said property are set Out in Section 1.0 of the Valuation Report at page 3 (Page 5 of Bundle E). In summary, we have been instructed to assess the Market Value of 5 units namely Parcels No. A1A/15/1, A1A/15/2, A1D 05/2, AID/19/2 and A1D/23/2 of the former project known as Villa Perhentian Condominium at Sentul East.

**[35]** Sr Lee went on to say:

> As the *Villa Perhentian Condominium was recommenced and changed its name to The Saffron* at Sentul East by Sentul Raya Sdn Bhd, we have been specifically instructed *to assess the market value of the The Saffron Condominium units as a reference guide for the Market Value of the Villa Perhentian Condominium units* on the assumption that should Villa Perhentian Condominium units exist at present. (Emphasis added.)

**[36]** Sr Lee's opinion was that the current purchase price of each of the five units purchased by the plaintiffs, the floor area of which is 107.4sqmt/1,156sqft, ought to be RM 695,000, calculated at RM 640 per sqft But this was based on his assessment of a standard unit in The Saffron though the standard unit in The Saffron was comparatively slightly smaller in size to the units purchased by the plaintiffs in Villa Perhentian.

**[37]** Sr Lee conceded that he was not aware of the content of the Court of Appeal's order and that he did not undertake a valuation of the unit of Villa Perhentian, but rather he did a valuation of units in The Saffron. He thought, or was instructed (wrongly perhaps), that the Villa Perhentian was 're-named' as The Saffron.

**[38]** It was also a matter of some significance that Sr Lee's 2016 valuation report did not comply with the requirement of O 40A r 3(2)(h) of the Rules of Court 2012, which states that the report by the experts of the parties shall 'contain a statement that the expert understands that in giving his report, his overriding duty is to the court and that he complies with that duty'.

**[39]** On the other hand, the defendant's valuer, surveyor Zamri bin Ramli (DW2 — 'Sr Zamri') prepared a valuation report dated 26 January 2017 and a further report dated 24 March 2017. The latter report was essentially a critique of Sr Lee's valuation report. Sr Zamri's criticism of Sr Lee's valuation was as follows:

> The Client have instructed us to provide our comments on the Valuation Reports, including whether The Saffron condominium is a proper and suitable comparable unit to the abandoned Villa Perhentian condominium project, as adopted by the plaintiffs' valuer, Sr Lee.
>
> Based on our findings, notwithstanding the location of The Saffron Condominium development was where the abandoned Villa Perhentian condominium was located, The Saffron Condominium was a completely different development that was only launched in April 2006 and completed in May 2008, has layouts, designs as well as facilities that are vastly different from the Villa Perhentian Condominium.
>
> Given the same, we found that Sr Lee who has used The Saffron condominium as the basis to assess the market value of Villa Perhentian Condominium has made inaccurate findings under 1.0 of the Valuation Report by stating that 'Villa Perhentian Condominium project was abandoned and later the project was re-commenced by the Developer, Sentul Raya Sdn. Bhd.

A The project changed its name to The Saffron at Sentul East. Further, upon our perusal of the Court of Appeal's Order dated 12th June 2014, we are of the opinion that the basis of his valuation is inaccurate.

As explained above, Villa Perhentian condominium and The Saffron condominium are entirely different projects, of which the latter is a condominium project while B The Saffron condominium is a high-end condominium. A detailed explanation showing the vast differences between the property data of Vila Perhentian condominium and The Saffron condominium is shown in Point 2.0 of this Supplementary Report below.

C **[40]** In so far as the market value of a comparable condominium unit is concerned, Sr Zamri took the Sang Suria condominium as a comparable and formed the opinion that the current purchase price of each of the five units purchased by the plaintiffs in Villa Perhentian, with the floor area of 107.4 sqmt/1,156 sqft, ought to be RM520,200, calculated at RM450 per sqft, as of D 12 June 2014.

**[41]** Sr Zamri had arrived at a market value consistent with the terms of the payment of general damages in lieu of specific performance and the assessment E of general damages provision in the 2014 Court of Appeal order, at RM450 per sqft after having regard to amongst others, the following matters:

(a) Sang Suria was located in the same vicinity as Villa Perhentian;

(b) Sang Suria and Villa Perhentian possessed similar property data;

F (c) Sang Suria was launched in 1994 whilst Villa Perhentian was launched in 1996;

(d) Sang Suria and Villa Perhentian offered very similar facilities;

(e) there were similarities in the building technologies and quality of G building materials; and

(f) Sang Suria was built by the same developer.

**[42]** The SAR agreed with the defendant and ruled that Sr Lee had failed to H comply with the 2014 Court of Appeal order. This was primarily due to Sr Lee's failure to determine the market value of condominium units in the vicinity which are similar to Villa Perhentian (instead of The Saffron). Thus, the plaintiffs could not rely on Sr Lee's valuation report to support their claim for compensatory damages from the defendant for breach of contract.

I **[43]** The SAR concluded that *sans* Sr Lee's valuation report, there was no evidence to enable her to assess the actual loss suffered and ruled that the plaintiffs had not proven their claim and were therefore only entitled to *nominal damages* of RM60,000, collectively for all the plaintiffs, with interest.

**[44]** The plaintiffs filed an appeal (encl 70) to the judge in chambers against the SAR's Order. There were two issues before the judge, namely:

(a) whether the SAR erred in deciding that the plaintiffs could not rely on the valuation report prepared by the plaintiffs' valuer (Sr Lee) to claim compensatory damages from the defendant for breach of contract due to Sr Lee's failure to comply with the 2014 Court of Appeal order? and

(b) whether the plaintiffs were nevertheless entitled to rely on Sr Zamri's valuation report and supplemental valuation report as the basis for the assessment of general damages?

**[45]** The plaintiffs' complaint on appeal before the judge was that the SAR had failed to consider the totality of evidence, that is, Sr Zamri's reports which was before her, and that they are not precluded from relying on the evidence of the defence to establish their case. However, the judge was of the view that the SAR did not err in rejecting Sr Lee's valuation report due to his failure to comply with the 2014 Court of Appeal order, and non-compliance with O 40A r 3(2)(h) of the Rules of Court 2012.

**[46]** Thus, due to his ignorance of the content of the 2014 Court of Appeal order, Sr Lee erroneously valued the standard unit in The Saffron instead of a unit in a project in the vicinity which is similar to Villa Perhentian. This was regarded as a material defect in Sr Lee's valuation report. The judge opined that since there was a material defect in Sr Lee's valuation report due to his non-compliance with the 2014 Court of Appeal order, the SAR acted correctly in disregarding it. The judge concluded that Sr Lee had demonstrated himself to be neither a credible witness, nor a proper expert valuer for purposes of encl 36.

**[47]** On the other hand, the judge found that Sr Zamri's valuation reports were prepared comprehensively for the purposes of encl 36 in accordance with the terms of the payment of general damages in lieu of specific performance and the assessment of general damages provision in the 2014 Court of Appeal order.

**[48]** The judge also noted that Sr Zamri's valuation report dated 24 March 2017 was prepared to rebut the veracity and credibility of Lee's valuation report and more importantly, that Sr Zamri's main valuation report was prepared with an overriding duty to the court in accordance with O 40A r 3(2)(h) of the Rules of Court 2012.

**[49]** En Zamri had explained that The Saffron is not a suitable 'comparable' and it would not be possible to adjust the value based on The Saffron since it is a very different development in comparison to Villa Perhentian. For purposes

of preparing his reports, the judge found that Sr Zamri had chosen Sang Suria as the best comparable in the vicinity.

**[50]** The judge found that the plaintiffs have failed to adduce sufficient credible evidence before the SAR to support their claim for substantial damages of a sum of RM695,000, calculated at RM640 per sqft based on Sr Lee's valuation of the market value of a standard unit in The Saffron.

**[51]** In so far as the plaintiffs' suggestion that they are at the very least entitled to compensation based on Sr Zamri's valuation, the judge found that the plaintiffs had taken a wholly different stance from the one taken before the SAR vis a vis Sr Zamri's reports and implicitly abandoned their (previous) challenge to Sr Zamri's reports, which amounted to a complete change from their earlier vigorous challenge of the same.

**[52]** The judge agreed with the defendant that the plaintiffs having opted and taken a clear and unequivocal stance during the cross-examination proceedings and submissions before the SAR, ought not to be allowed to approbate and reprobate or to take advantage of their own mistake.

**[53]** The judge was of the view that the plaintiffs had clearly elected to challenge, deny and dispute Sr Zamri's valuation and they cannot subsequently seek to rely on and benefit from Sr Zamri's valuation to overcome their own failure to tender good evidence.

**[54]** The judge ruled that since the plaintiffs had challenged and rejected Sr Zamri's valuation, they were therefore estopped from relying on the same based on the doctrine of 'judicial estoppel' which precludes the plaintiffs from taking a stand inconsistent with the position they had taken earlier in the assessment of damages.

**[55]** Hence, the judge was of the view that plaintiffs ought not to be allowed to rely on Sr Zamri's valuation reports to claim for substantial damages against the defendant. The judge therefore agreed with the SAR and concluded that the plaintiffs are only entitled to *nominal* damages. In the result, on 7 January 2019, the judge decided in favour of the defendant, and ordered that encl 70 be dismissed with costs.

OUR DECISION

**[56]** We are acutely aware that assessment of damages involves findings of fact and is seldom disturbed, unless there is a clear error of law, or that the amount awarded is erroneous for being without any basis or justification. The principle in this regard was reiterated by the Court of Appeal in *Voo Nyuk Fah*

*@ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229 (CA). In that case the Court of Appeal made reference to *Flint v Lovell* [1935] 1 KB 354, where Greer LJ enunciated the principle as follows:

> ... the court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that *this court should be convinced either that the judge acted upon some wrong principle of law*, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (Emphasis added.)

**[57]** We may turn now to the issue at hand. The relevant order for purposes of assessment of damages is the 2014 Court of Appeal order which had ordered that the defendant is to pay damages to the plaintiffs based on the difference between the market value of similar condominium units in the vicinity, and the purchase price under the SPAs.

**[58]** The assessment of damages was conducted by the SAR on 16 and 17 January 2018. Several witnesses testified for the plaintiffs, including their valuer, Sr Lee who produced an initial valuation report dated 24 November 2011, and a later report dated 8 November 2016. The defendant's valuer, Sr Zamri produced two reports, and these are dated 26 January 2017 and 24 March 2017.

**[59]** The SAR disregarded Sr Lee's valuation report dated 24 November 2011 as it was used in earlier proceedings which gave rise to an order for damages that had subsequently been set aside by the appellate courts. Hence, the SAR (*correctly*) ruled that, that report was no longer to be used.

**[60]** And as for Sr Lee's report dated 8 November 2016, the SAR decided that the report must also be rejected as it did not comply with O 40A r 3(2)(h) of the Rules of Court 2012, and in addition, it was not in compliance with the 2014 Court of Appeal order which had ordered that the damages be based on the market value of condominium units in the vicinity which are comparable to the Perhentian Villa project.

**[61]** Regrettably, Sr Lee appeared not to be aware of the ambit of the 2014 Court of Appeal order and his valuation was based on the market value of The Saffron. That was a mistake on his part. Sr Lee thought, or was instructed, that Villa Perhentian project was 'renamed' as 'The Saffron'. Thus, Sr Lee valued The Saffron at RM640 per sqft or RM695,000 per unit.

**[62]** On the other hand, Sr Zamri was clear about the scope of the 2014

Court of Appeal order. In fact, the relevant part of the 2014 Court of Appeal order was reproduced in Sr Zamri's valuation report. Sr Zamri undertook a valuation of the units of the Villa Perhentian condominium (which were never completed) by using the Sang Suria condominium as the closest comparable. He gave his reasons for using the Sang Suria condominium. Sr Zamri's valuation was RM450 per sqft or RM520,200 per unit (see para [40] above).

**[63]** During the hearing of the assessment, the plaintiffs challenged the correctness of Sr Zamri's valuation. The plaintiffs did not proffer an alternative argument that if Sr Lee's valuation is rejected, then damages should be awarded based on the valuation given by Sr Zamri.

**[64]** Ultimately, the SAR rejected Sr Lee's valuation in its entirety and concluded that the plaintiffs had not proven any damages. As such, on 4 May 2018, the SAR awarded RM60,000 *nominal* damages with interest. The plaintiffs appealed to the Judge in Chambers which was by way of a re-hearing. On 7 January 2019, the judge dismissed the plaintiffs' appeal. Hence, the plaintiffs have appealed to the Court of Appeal.

**[65]** For the plaintiffs, it was contended first, that Sr Lee's valuation was erroneously rejected. Secondly, it was argued that the SAR and/or the judge should have allowed damages based on Sr Zamri's valuation.

**[66]** For the defendant, it was argued that the plaintiffs had the burden of proving damages, not the defendant see: *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practicing as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465 (FC) (per Ariffin Zakaria CJ at [32]). It was also argued that the plaintiffs must lead evidence to prove their case (on damages) before the evidential burden of proof might shift to the other side. See: *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 (HC).

**[67]** It was also contended for the defendant, that the plaintiffs who are seeking substantial damages have the burden of proving the fact of damages, and the amount of damages claimed. See: *Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635 (HC). Counsel for the defendant contended that at best, the plaintiffs were entitled to only *nominal* damages.

**[68]** For the plaintiffs it was contended that even if Sr Lee's second valuation in 2016 is rejected, damages based on Sr Zamri's valuation should have been ordered as the plaintiffs are entitled to rely on the defendant's evidence.

**[69]** Counsel for the plaintiffs relied on the Court of Appeal's decision in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2017] 2 MLJ 445; [2006] 4 CLJ 715

(CA) where the principle was enunciated as follows:

> [3] ... In a civil case, one party's evidence is the other's as well. So, *a plaintiff may rely on the defendant's evidence to prove his or her case*. The converse is also true. See, the observations of Hashim Yeop A Sani SCJ in *M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371; [1988] 1 CLJ 601; [1988] 1 CLJ Rep 168. (Emphasis added.)

**[70]** We agree with the defendant's submission that Sr Lee's 2016 valuation was flawed as it was prepared based on a wrong premise. The provenance of Sr Lee's mistaken premise is not important. The fact is — he undertook a valuation on the (mistaken) assumption that he was to determine the market value of a unit in The Saffron. It is our view that there is no justification to interfere with the concurrent findings by the SAR and the judge, that Sr Lee's valuation report dated 8 November 2016 must be rejected.

**[71]** Counsel for the plaintiffs maintained that even if Sr Lee's valuation is rejected, the SAR and the judge ought to have awarded damages based on Sr Zamri's valuation, as that is the minimum benchmark for the market value of condominium units in the vicinity of Villa Perhentian.

**[72]** However, counsel for the defendant made a forceful argument that since the plaintiffs had challenged Sr Zamri's valuation report and had subjected him to cross-examination, the plaintiffs are 'precluded' from making a U-turn and cannot rely on Sr Zamri's valuation to obtain substantial damages. Counsel contended that the plaintiffs were precluded from doing so by the doctrine of judicial estoppel.

**[73]** The doctrine of judicial estoppel was explained by the Court of Appeal in *Peguam Negara Malaysia v Nurul Izzah Anwar & Ors* [2017] MLJU 273; [2017] 5 CLJ 595 (CA) ('*Nurul Izzah*'s case') at para [21] in the following words:

> ... The essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal ...

**[74]** Counsel for the defendant relied on the Court of Appeal's decision in *Leisure Farm Corporation Sdn Bhd v Kabushiki Kaisha Ngu & Ors* [2017] 5 MLJ 63; [2017] 1 LNS 499 (CA) ('Leisure Farm') for the proposition that judicial estoppel will apply to preclude the plaintiffs from taking a stand which is inconsistent from that which was taken before the SAR and before the judge.

**[75]** It is necessary to examine the facts of *Leisure Farm* to understand the circumstances which could give rise to judicial estoppel. In *Leisure Farm*, the

appellant had filed an appeal to the Court of Appeal. Whilst the appellant's appeal was still pending before the Court of Appeal, the appellant took the position in a separate committal proceeding that the appeal before the Court of Appeal had been rendered illusory and nugatory.

**[76]** When the appeal came up for hearing, the appellant took a contrary position and contended that the appeal in the Court of Appeal was not academic. The Court of Appeal's opinion vis a vis the inconsistent position taken by the appellant in the committal proceedings and in the appeal, is succinctly set out in the following paragraphs of the judgment and reads as:

> [ 16] Learned counsel for the second respondent further reinforces the submission of the first respondent when he submits the remaining point before us. His contention is couched in forceful but deferential terms when he says that the appellant's assertion in para 29 of the affidavit in support of the committal application was made in this court during the hearing of the said application to the effect that this appeal had been rendered illusory and nugatory. The appellant, however, is now saying that it is not academic. That, learned counsel submits, is not permitted.
>
> Learned counsel's argument directed before us as we understand it, is that, in view of its earlier stand in the committal proceedings, judicial estoppel would operate to now estop the appellant from taking an inconsistent position during the appeal. It is clear to this court that *the object of judicial estoppel is to prevent a party who assumes a particular position in litigation to take an inconsistent position in later litigation*. Christopher Clarke J explained the law on judicial estoppel in *OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others* [2008] EWHC 2613 (Comm) and we now quote the relevant excerpts:
>
> The Court of Appeals for the Sixth Circuit explained the position in *Edwards v Aetna Life and Casualty* 690 F 2s 595 (1982):
>
> The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel. *Courts apply equitable estoppel to prevent a party from contradicting a position taken in a prior judicial proceeding* ... Equitable estoppel enables a party to avoid litigating, in the second proceeding, claims which are plainly inconsistent with those litigated in the first proceeding. Because the doctrine is intended to ensure fair dealing between the parties, *the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent's prior position*. See Id at 689–90. Collateral estoppel prevents relitigation of factual matters that were fully considered and decided in a prior proceeding. Thus, collateral estoppel operates to prevent repetitive litigation.
>
> ...
>
> The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding ... *Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not*

*exist*. … This distinction reflects the difference in the policies served by the two rules. *Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process*. … *Scarano v Central R Co* 203 F 2d 510, 512–13 (3rd Cir 1953) ('such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the court should not tolerate').

The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. … Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of issues previously decided. Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled …

…

[17] Also cited by learned counsel in the course of his oral submission on this point is this court's decision in the case of *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 in which it was held that the respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. The respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit. *Clearly, the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal* (*Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] MLJU 273). (Emphasis added.)

**[77]** In our view, judicial estoppel does not apply to the facts of the present case.

**[78]** First, it is important to note that the doctrine of judicial estoppel will only apply to a party where the said party against whom the doctrine is being asserted, had successfully and unequivocally persuaded the court on, or asserted, a position in an earlier proceeding so that when that had taken place, the party would be estopped from asserting an inconsistent position in a subsequent proceeding (see: [21] *Nurul Izzah*'s case). Here, the plaintiffs position in the assessment proceedings, namely that Sr Lee's valuation should be accepted, did not prevail.

**[79]** Secondly, the plaintiffs position that Sr Zamri's valuation should be rejected, also did not prevail. Thus, the plaintiffs failed on both counts. Thus, conceptually, the doctrine of judicial estoppel cannot apply.

**[80]** It is important to bear in mind that the theory behind the doctrine of

judicial estoppel is that parties should not be permitted to abuse the judicial process by taking inconsistent stands. On that premise it was contended that since the plaintiffs challenged Sr Zamri's valuation and cross-examined Sr Zamri, they should not be allowed to rely on the market valuation as determined by Sr Zamri.

**[81]** We do not agree that by challenging Sr Zamri's valuation and cross-examining him, the plaintiff is precluded from relying on the market valuation as determined by Sr Zamri.

**[82]** At the end of the day, the real question in this appeal is whether the rejection of Sr Lee's valuation of itself, is sufficient for the court to conclude that the plaintiffs have not proven any substantial damages. This is where we disagree with the approach that was taken by the SAR and the judge.

**[83]** They concluded (wrongly in our view) that because of the plaintiffs' stance in rejecting Sr Zamri's valuation during the assessment and not having made an alternative argument that Sr Zamri's valuation is to be utilised as the minimum valuation of the condominium units, the plaintiffs are not entitled to refer to Sr Zamri's valuation as a back-up to bolster their claim for damages.

**[84]** In this regard, the SAR and the judge committed a fundamental error in failing to realize that by introducing Sr Zamri's valuation at RM450 per sqft or RM520,200 per condominium unit, the defendant has in fact accepted, or implicitly admitted, or acquiesced to the fact that RM450 per sqft is the minimum valuation that is to be used in the hearing of the assessment of damages.

**[85]** No doubt, during the assessment the plaintiffs did reject Sr Zamri's valuation. But that of itself, does not mean that the open market value for a condominium unit which is comparable to Villa Perhentian project should be less than Sr Zamri's valuation. In challenging Sr Zamri's valuation, all that the plaintiffs were doing is that they were contending that his valuation is too low and should in fact, be higher.

**[86]** In the circumstances, by contending that Sr Zamri's valuation is to be ignored, the defendant had unwittingly invited the SAR and the judge, to reject critical evidence that was relevant to the question of damages. It is not out of place to mention that Sr Zamri declared in his valuation report that he prepared his report whilst adhering to his overriding to duty to the court.

**[87]** Indeed, it may be noted that the SAR and the judge did not reject Sr Zamri's valuation. This can only mean that they were convinced that Sr Zamri's valuation was the correct one. The question to be asked is — what then is the

justification for not using Sr Zamri's valuation for purposes assessing damages? The answer is — there is in fact no justification for depriving the plaintiffs of an award of substantial damages, based on Sr Zamri's valuation.

**[88]** It is clear and cannot be disputed that by introducing Sr Zamri's valuation, the defendant was saying to the SAR and the judge, that the court should rely on Sr Zamri's valuation when assessing damages. The defendant contended that the plaintiffs have taken a contradictory stand by first challenging, and later seeking to rely on Sr Zamri's valuation.

**[89]** In our view, the contradiction, if there is one, lies at the feet of the defendant, who on the one hand took the position that the market value for purposes of assessment of damages was RM450 per sqft (per Sr Zamri's report) and at the same time, impliedly inviting the court to ignore the market value which they had conceded to, and contending that the plaintiffs are only entitled to 'nominal' damages since Sr Lee's valuation was rejected.

**[90]** Counsel for the defendant said that Sr Zamri's valuation of RM450 per sqft was not an admission as to market value. With regret we find counsel's submissions that it was not an admission as to market value to be inherently unacceptable.

**[91]** It is relevant to ask — if Sr Zamri's determination of RM450 per sqft is not an admission as to market value, then what was it? What was the defendant's purpose in introducing Sr Zamri's valuation if it was not for the sole purpose of assisting the court in making an informed decision as to the quantum of damages that was to be awarded against the defendant?

**[92]** No doubt, Sr Lee's valuation had fallen by the wayside. But that is just one part of the picture.

**[93]** The court was under an overarching duty to examine the evidence, and if it finds that there is evidence, particularly an admission as to market value, then for the court to ignore that which has been admitted, would be nothing less than an abdication of the court's bounden duty to do justice according to the law.

**[94]** By asking that Sr Zamri's valuation as to the market value should be used for purposes of assessing damages, there was no abuse of the court's process by the plaintiffs, considering that the evidence of market value led by the plaintiffs had been rejected. Further, the plaintiffs had not gained any benefit or advantage in taking the earlier stance of challenging Sr Zamri's valuation or in cross-examining him.

A **[95]** In the result, by acceding to the defendant's stance, the SAR and the judge misdirected themselves in ignoring the trite principle that the plaintiffs are entitled to rely upon any evidence that is before the court, including but not limited to evidence that is adduced by the defendant.

B **[96]** In our view, the plaintiffs reliance on the defendant's evidence does not offend the principle that the plaintiffs have the burden of proving the fact and quantum of damages.

C **[97]** Since, Sr Zamri's valuation was properly before the court, it was the duty of the SAR and the judge to take Sr Zamri's valuation into account. See *Tan Kah Khiam v Liew Chin Chuan & Anor* [2017] 2 MLJ 445; [2006] 4 CLJ 715 (CA).

D **[98]** The position may well have been different had the defendant offered no evidence and submitted no case to answer on the question of damages. They could have but chose not to do so. Counsel for the defendant complained that he had no choice in the matter as he had to file his expert's report as per the timeline which had been fixed by the court.

E

**[99]** Regardless, after seeing Sr Lee's report, the defendant could have, but did not take the position that they would not be calling Sr Zamri to testify. Had they done so, then Sr Zamri's valuation report may have been excluded. Obviously, the defendant chose not to do away with Sr Zamri's report and oral
F evidence, because that would have been too risky as there was no certainty that Sr Lee's report would be rejected. As such, the defendant proceeded to adduce Sr Zamri's evidence of the proper market value of the condominium unit in Villa Perhentian.

G

**[100]** Indeed, another dimension to Sr Zamri's evidence is that since he had (as the defendant's expert) opined that the market value of the units in the vicinity of Villa Perhentian is RM450 per sqft, such evidence on his part, adduced unconditionally for and on behalf of the defendant, and done with the
H awareness that he had an overriding duty to the court, should have been treated as a fact which has been admitted and need not be proved.

**[101]** In this regard, s 58 of the Evidence Act 1950 is applicable. Section 58
I reads:

> (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. A

(2) This section has no application to criminal proceedings.

**[102]** In the circumstances, the defendant's submission that Sr Zamri's evidence of the market value should not be relied upon is an invitation to the court to wilfully turn the proverbial blind eye to an admitted fact which is relevant, and which was staring at the face of the court. B

**[103]** The outcome which resulted in an award of *nominal* damages by the SAR in 2018 and upheld by the judge in 2019, was a wholly unjust result, to say the least. In our view, the SAR and the judge misdirected themselves in failing to grant substantial damages based on Sr Zamri's valuation. C

**[104]** There is another facet to this issue and that is one from the perspective of the court. When damages are ordered to be assessed, the right to damages would have been established. While evidence of the damages suffered that was proffered by the plaintiffs may have been rejected, it does not follow that the evidence proffered by the defendant, which was not rejected, ceases to exist. D

**[105]** The defendant's evidence as to the market value, not rejected by the SAR, remains and cannot be ignored. It does not matter who tendered the evidence but so long as the evidence was admissible and admitted, it cannot be ignored particularly if evidence given to the contrary has been found wanting and rejected. E F

**[106]** In the circumstances and for the reasons stated above, we are compelled to the view, that any reasonable tribunal, properly armed with these facts and applying the legal principles alluded to earlier, would have concluded that based on Sr Zamri's valuation, the plaintiffs were entitled to damages based on RM520,200 per condominium unit or RM450 per sqft. Hence, appellate intervention is warranted. G

**[107]** We therefore allowed the appeal and set aside the decision of the High Court and substituted it with an order/judgment for damages based on RM450 per sqft. The order/judgment for the respective plaintiffs is as follows: H

(a) *first plaintiff*: (Purchase Price – Market Value): RM520,200 - RM196,660 = *RM323,540*

(b) *second and third plaintiffs jointly*: (purchase price – market value): RM520,200 - RM199,660 = *RM323,540* I

(c) *fourth plaintiff*: – (purchase price – market value): RM520,200 - RM189,460 = *RM330,740*

A (d) *fifth and sixth plaintiffs jointly*: — (purchase price – market value): RM520,200 - RM185,460 = *RM334,740*

(e) *seventh plaintiff*: — (purchase price – market value): RM520,200 - RM189,460 = *RM330,740*

B **[108]** As ordered previously there shall be interest at 8%pa from the date of the High Court judgment ie, from 29 May 2012 until 31 July 2012 and thereafter at 5%pa from 1 August 2012 to the date of full payment or realisation.

C **[109]** We awarded costs of *RM20,000* to the plaintiffs, as costs here and below.

*Appeal allowed with costs.*

D Reported by Muhamad Azham Marwan

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